IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 95.

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES, AND GEORGE M. HARRISON,

Petitioners,

v.

DUQUESNE WAREHOUSE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 103.

DUQUESNE WAREHOUSE COMPANY,

Petitioner,

v.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

ANSWERING BRIEF FOR DUQUESNE WAREHOUSE COMPANY, RESPONDENT IN NO. 95, AND PETITIONER IN NO. 103.

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ARGUMENT.

I. The Contention of the Retirement Board and the Brotherhood That the Services Covered In the "Employer" Definition of the Retirement and Unemployment Acts Have Greater Breadth Than Those Covered In the Definition of "Transportation" In the Interstate Commerce Act, and That, Therefore, the Statutory Terms Involved In the Instant Cases Be Not Given the Same Construction As In the Commerce Act, Is Erroneous.

(1) It is not our contention that the Retirement and Unemployment Acts cover no types of service that are not regulated by the Interstate Commerce Act. Maintenance and track work are cases in point. But clearly such work is "in connection with" transportation, having to do with the very facilities through which the rail movement is conducted. In the instant cases the services which are in issue are of the type enumerated in the Commerce Act. They can only be brought under the Retirement and Unemployment Acts through words imported into those acts from the Railway Labor Act, in which they were inserted from the Commerce Act by an Interstate Commerce Commissioner.

And it is essential to notice that those words in the Refirement and Unemployment Acts, such as receipt, delivery, storage and handling, are qualified by the words "transported by railroad," being the same as the word "transported" in the Commerce Act where the additional words "by railroad" were unnecessary. Our position on this, which is that such services must be in connection with the property while in the course of railroad transportation, is covered more fully in our main brief (pp. 45-53). This limited scope is reinforced by this testimony from the same Mr. Harrison before the Senate Committee on S. 2395 (Retirement Bill 75th Congress, 1st Session, May 21, 1937:

"Senator Davis:—What trucking service do you except?

"MR. HARRISON:—Well, you see the railroads recently have inaugurated store-door pick-up and delivery merchandise service, for merchandise freight. And that store-door pick-up and delivery service for merchandise freight is at the present time quite generally handled under contract by an outside trucking company.

"SENATOR SMITH:—And not by the regular employees of the railroad?

"MR. HARRISON:—No. So therefore it only excludes a company that might be engaged in the transportation of property for the railroad, if that company is engaged in the business of trucking the freight; that means motor trucks.

"SENATOR MINTON:—Does it take in a company like the Greyhound Co.?

"MR. HARRISON:—No; that comes under title II of the Interstate Commerce Act.

"THE CHAIRMAN:—But it says [reading]:

'(*a*) The term "employer" means any express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith.'

"MR. HARRISON:—Yes. But that is qualified later on, Senator.

"THE CHAIRMAN:—I see; I was wondering if there was a qualification. I did not see any in that paragraph.

"SENATOR MINTON:—It says 'trucking service.'

"MR. HARRISON:—Well, this is the statement [reading]:

'(*a*) The term "employer" means any express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service)——'

"And then here is the qualification [reading]:

> "in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad'." (pp. 11-12).

And when the same witness spoke of "elevator companies that handle the storage of grain" (R. B. Brief 33), he could only have had in mind the express requirement with respect to through export freight, at that time contained in the Commerce Act (Sec. 25 (4)), that "In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the vessel as a part of its undertaking as a common carrier." This has since been repealed (54 Stat. at p. 949).

Further discussion of this phase of the case, we suggest, is unnecessary because we think this Court has already determined that these words "transported by railroad" apply only when the property is in the course of railroad transportation. The case before the Court was *Cleveland, C. C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588. There the question presented was with respect to limitation of liability as to value contained in the covering bill of lading after the shipment had reached destination and the responsibility of the carrier had descended to that of warehouseman. This Court held that under the terms of the Commerce Act such storage while the goods were in possession of the carrier was part of the railroad transportation. It said this:

> "And this is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584, c. 3591), which enlarged the definition of the term 'transportation,' (this, under the original act, included merely 'all instruments of shipment or carriage') so as to include 'cars and other vehicles and all instrumentalities and facilities of

shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection with* the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, *storage*, and hauling *of property transported*; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish *such transportation* upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. All charges made for *any service rendered or to be rendered in the transportation* of passengers or property *as aforesaid, or in connection therewith*, shall be just and reasonable; and every unjust and unreasonable charge *for such service or any part thereof* is prohibited and declared to be unlawful'" (pp. 593-4). (Italics are those of the Court.)

Further, that the services which Dequesne performs are not a part of railroad transportation is also clear. On this it may assist the Court if we mention the case of *McLeod v. Threlkeld*, 319 U. S. 491. It arose under the Fair Labor Standards Act, and involved the question whether the services of a cook employed by contractors to serve meals to maintenance of way employes of a railway company was engaged in commerce under the terms of that act. This Court held in the negative, and said this:

> "Such a ruling under the Federal Employers' Liability Act, after the Bolle, Industrial Commission and Bezue cases, *supra*, note 9, should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under

this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulations, are governed by the other phrase, 'production of goods for commerce.'

"It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of Board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other" (pp. 496-7).

2. It is argued that the decisions of the Commerce Commission are inconsistent on the question of storage, and so do not furnish a clear guide as to the matter under controversy (R. B. Brief 14, 40-49). None of the authorities say that it is a carrier's duty to furnish commercial warehousing, such as is performed by Duquesne. All are to the contrary. There are services which are beyond the duty of a carrier to furnish but which are a part of railroad transportation when and if performed by the carrier. But in such cases and during those periods the goods are in possession of the carrier, and are subject to the carrier's bill of lading. (*In re Bills of Lading*, 52 I. C. C. 671.) This is so in all the cases relied upon by the Retirement Board. For instance, in the *American Warehousemen's Association* case, 188 I. C. C. 13, the goods were in possession of the barge line. *Storage in Transit at New Haven, Conn.*, 190 I. C. C. 209, was an I. & S. proceeding, and the tariff was not permitted to become

effective. But there the proposal was storage while the goods were in possession of the carrier by its agent, and also while they were under the bill of lading of the carrier. In *Storage at New London & Thamesville, Conn.*, 190 I. C. C. 213, the proposed storage was again while the goods were in possession of the carrier and being transported under the carrier's bill of lading. So also in *Western Transit Co.* v. *Leslie*, 242 U. S. 448. In *Storage of Cocoa Beans in New York District*, 231 I. C. C. 575, the goods were not in possession of the carriers at all. The question there was, for how long a period they could be kept in outside commercial storage before being shipped out by rail from the storage point. There is no inconsistency in the decisions of the Commission *on the point that* commercial storage in a warehouse operated by a separate company is not part of railroad transportation when the goods have been delivered to the warehouse by the carrier and the carrier's bill of lading has become spent.

II. The Argument That the Findings Of the Board Are Binding Upon This Court Is Untenable Because (1) the Findings Excepted To By Duquesne Are Not Findings Of Fact, and Also (2) Since They Go To the Jurisdiction Of the Board, the Court Is At Liberty To Reach Its Own Conclusion With Respect Thereto.

The Retirement Board in its brief (pp. 53-4) urges that the findings of the Board are controlling upon the Court. True, this is grounded on the contention that the interpretation placed upon the statutes by the Board is a reasonable one. The Brotherhood in its brief (pp. 39-40) claims persuasiveness on the ground of alleged consistent application by the Board. We answer as follows:

(*a*) Those parts of the findings of the Board to which we take exception are italicized in the appendix of our main brief. They are not fact findings at all. Their very text shows the fallacy of the argument that they are findings of fact. For instance, that portion of the third finding which says that "Duquesne's operations are now and have been at least since August 28, 1935, intimately and integrally related to Pennsylvania's railroad transportation" assumes to be a finding of fact but is nothing more than a conclusion drawn from stated facts which on a correct view of the law, fail entirely to support it.[1]

(*b*) The Retirement Act itself in Section 11, which is the part justifying the appeal, contains nothing as to the findings of the Board. In the Unemployment Act, Section 5 (f), it is provided that "the findings of the Board *as to the facts*, if supported by evidence and in the absence of fraud, shall be conclusive." (Italics supplied.) But it is also expressly provided in Section 5 (c) that the review of the Board's decisions shall be "subject to all provisions of law applicable to the review of such decisions." In any event, it is to be noted that the conclusiveness is *as to the facts* if supported by evidence, meaning of course substantial evidence (*National Labor R. Board* v. *Columbian E. & Stamping Co., Inc.*, 306 U. S. 292, 299). But the Board did not find any facts other than those submitted by Duquesne. To them the Board added its conclusions. And they do not fit.

It is argued (R. B. Brief 52) that support for the Board's position is found in such cases as *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131; *Gray* v. *Powell*, 314 U. S. 402; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145-6; and *United States* v. *Louisville & N. R. R. Co.*, 235 U. S. 314.

[1] What is meant by an integral part of railroad transportation can be gathered from the testimony of Mr. Eastman quoted on p. 28 of our main brief.

As to the *Hearst Publications* case, the majority opinion in the Second Circuit in the *Duquesne* case answered it in this way:

"* * * The opinion in Labor Board *v.* Hearst, the case mainly relied on here, makes clear the difference between that case and this. Pointing out that Congress, without defining it, had used a broad term 'employees' broadly, leaving to the Labor Board to determine its application in particular situations, the Court said,

> 'But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it intially, the reviewing court's function is limited.'

Citing decisions of similar purport, it then concludes:

> 'the board's determination * * * is to be accepted if it has "warrant in the record" and a reasonable basis in law.'

Here Congress did not use the term 'employer' broadly. On the contrary, it gave it a precise, a definite meaning. In this situation, the preceding sentence in the Hearst opinion, 'Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute,' furnishes the guiding rule * * *" (R. 308).

Gray v. *Powell* has been described as "a case which perhaps went as far as any other"—*Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. (2d) 787, at 792. But in the instant cases Duquesne did not go to the Retirement Board asking to have its status determined. The terms of the statute did not so require as in the *Gray* case. The Retirement Board initiated the proceeding, and of its own motion attempted to determine the status.

But the finality of the status has not by the terms of either the Retirement Act or the Unemployment Insurance Act been committed to the Retirement Board. Review is xpressly provided in both statutes.

In the *Rochester* case there was no question as to the power of the Federal Communications Commission to determine the question of control. But that case sustains the point, as here contended, that where there is no evidence to support the finding of the administrative body as to the facts, that finding will not be supported by the court.

In the *Louisville & Nashville* case, it is true that the facts were not disputed. But the issue was with respect to undue preference (Sec. 3 (1)) of the Commerce Act, and unjust discrimination (Sec. 2), same act. These, under the Commerce Act, are administrative matters exclusively within the jurisdiction of the Commission. And even in that case reliance is placed upon the earlier *Louisville & Nashville* case in 227 U. S. 88, where this Court said, "if there was no evidence to show that the rates were unreasonable, there was no justification to make the order" (p. 92).

More to the point at issue are these cases: *State of North Carolina* v. *United States*, U. S. (June 11, 1945); *Bingham's Trust v. Commissioner*, U. S. (April 27, 1945); *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281, 286; *Helvering* v. *American Dental Co.*, 318 U. S. 322, 330.

(c) It is contended that the decision of the Board should not be disturbed because it is said the interpretation placed upon the statutes by the Board has been consistently followed by it (Brotherhood Brief, pp. 34, 39). The fact is the Board has been anything but consistent. It gave the correct interpretation in its report to Congress as appearing on page 47 of our main brief. It followed that in the *Ocean Steamship Company* case, 123 F. (2d) 469, 470. Thereafter it reversed itself in an effort to

ascend to the level set by the Commissioner of Internal Revenue. And while the Retirement Board now seeks to differentiate between the steamship cases and the instant cases (R. B. Brief 8-9), as also did the Appellate Court in No. 103 on another ground (R. No. 103, p. 86), it is important to note that the Retirement Board in its opinion in the *Ocean Steamship Company* case attempted no such distinction, but placed its decision on precisely the same grounds now urged in the instant cases.

> "In my opinion, it is established from all of the foregoing materials that Osco is and has been principally engaged in the performance of services in connection with the transportation of passengers and property by railroad, and the receipt, delivery, transfer in transit, and handling of property transported by railroad, within the meaning of Section 1 (a) of the Railroad Retirement and Railroad Unemployment Insurance Acts and Sections 202.07 and 202.08 of the Regulations. It is clear that in transporting traffic composed of freight and passengers interchanged with Central and other railroads and thus constituting an integral part of their rail water routes, Osco is engaged in the performance of a service which is reasonably directly related both functionally and economically to the performance by such railroads of their obligations as common carriers by railroad and which, therefore, constitutes a service in connection with the transportation of passengers and property by railroad. Board ruling of June 30, 1938, on *New England Steamship Company;* General Counsel's Opinion No. 1939 R. R. 7 on *Rutland Transit Company;* General Counsel's Opinion No. 1939 R. R. 112 on *Canada Atlantic Transit Company;* General Counsel's Opinion No. 1939 R. R. 117 on *Lake Erie Navigation Company;* my opinion of December 11, 1939, on *San Francisco and Portland Steamship Company,* L-39-817.
>
> "It is also clear that the terminal activities conducted by Osco in the handling of railroad interchanged freight consisting of the delivery and receipt of such freight, the discharging and loading of such

freight from ships, the loading, unloading, dunnaging, and bracing of railroad cars for the shipment of such freight, and the lighterage of inbound and outbound railroad interchange traffic, constitute the operation of equipment and facilities and the performance of services in connection with the receipt, delivery, transfer in transit, and handling of property transported by railroad within the meaning of the Acts and the Regulations. Indeed, such services have repeatedly been recognized as railroad transportation services. (Citing cases.) * * *"

Ocean Steamship Company of Savannah, R. R. B. Law Bulletin No. 2, 420, 436.

See also *Interstate Transit Lines v. United States*, 56 F. Supp. 332, 334.

There is further this highly important fact that the Retirement Board in the continued effort of two of its members to extend its coverage in these cases and related ones, has been arrayed and is now arrayed against not only what eight Federal courts have said but against the opinion, which appears to be unanimous, of the Social Security Board and its continued practice under the act which that Board administers. That Board has asked to have brought to the attention of the Court that it does not agree with the interpretation placed upon he Retirement and Unemployment Acts by the Retirement Board, and that it has not followed that interpretation in administering the Social Security Act. The position taken by the Social Security Board is set forth in Appendix E of the Railroad Retirement Board's brief, but it is of such importance that we quote part of it here.

"The Social Security Board takes the position, on the basis of the legislative history of the coverage definition, that Congress intended to confine the railroad legislation to the railroad industry, and not to extend it to segments of other industries, such as water or motor transportation, by reason of the ownership of the stock of companies engaged in such activities. That Board believes that the basic inten-

tion in framing the coverage defintion in the Railway Labor Act amendments of 1934 was to paraphrase the definition of 'transportation' in section 1 (3) of the Interstate Commerce Act; and that the only reason for departing in this respect from the original draft, which had in terms referred to the Commerce Act definition, was the objection by the chairman of the Senate committee to a technique of draftsmanship which required reference to another act (Senate Hearings on S. 3266, 73d Cong., 2d Sess., pp. 10-11, 145-6). The Social Security Board has recognized that this interpretation cannot be applied rigidly in all cases, and has not applied it in the few instances that have come before that Board in which a railroad company has turned over to a subsidiary a part of the normal railroad operation, such as maintenance of equipment. Its position is that the Congressional intention to cover these occasional cases does not outweigh the evidence that the general rule to be applied in other situations was meant to be that of the Interstate Commerce Act definition.

. . . . . .

"The Social Security Board's interpretation of the act is the same as that adopted by the Circuit Court of Appeals for the Fifth Circuit in *Ocean Steamship Company of Savannah* v. *Allen*, 123 F. (2d) 469; the Circuit Court of Appeals for the Fourth Circuit in *Walling* v. *Baltimore Steam Packet Company*, 144 F. (2d). 130, the majority of the Court below in number 95, reported at 148 F. (2d) 473, and the Federal District Court for the District of Nebraska in *Interstate Transit Lines* v. *United States*, 56 Fed. Supp. 332.

"The Social Security Board calls attention to the fact that its decisions are entitled, upon judicial review to as great a measure of finality as are those of the Railroad Retirement Board (see Social Security Act, as amended, sec. 205 (g); 42 U. S. C. sec. 405 (g))" (pp. 84-86).

(d) *The question to be determined from the undisputed facts in these cases is one of jurisdiction*, and by neither of these statutes have the courts been shorn of

their power to judge. The precise question came before the Circuit Court of Appeals for the Tenth Circuit in *Utah Copper Co.* v. *Railroad Retirement Board*, 129 F. (2d) 358. In rejecting the position taken by the Retirement Board there, and now asserted here, that court said this:

> "The Railroad Retirement Act is silent on the power of the Board to pass upon the question of jurisdiction. The question is of course present in all proceedings before the Board and must of necessity be decided before the Board can proceed. But in the absence of a specific provision in the act, expressly lodging the decision of the jurisdictional question in the Board, its decision, even if supported by competent evidence, is not final and may be independently examined by a court of review. The court was therefore in error in dismissing the proceedings on the ground that the decision of the Board in this respect was final because supported by competent evidence" (pp. 361-2).

Certiorari was denied, 317 U. S. 687.

See also *United States* v. *State of Idaho*, 298 U. S. 105.

We find no difficulty with cases relied upon by the Retirement Board, such as the *South* and *Watts* cases referred to in footnote 49 on pp. 53-4 of its brief. They are not in point. There the questions at issue were purely administrative—whether in an employment relation to a carrier. And curiously enough, the opinions in both of those cases were written by the same judge who wrote the prevailing opinion in No. 95.

III. The Reports Of the Senate And House Committees Are Not At Variance With What Was Said By the Witnesses At the Hearings Before Those Committees; And Lend No Support To the Position Taken By the Retirement Board and the Brotherhood.

The Retirement Board on brief (pp. 31-2) and the Brotherhood also on brief (p. 25) seek support in these

reports for the construction placed by them upon the employer definition in the statutes. The more particular language relied upon is this from the Senate report:

> "By these changes there are brought within the scope of the act substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States." (Senate Report on S. 2395, 75th Congress, 1st Session, p. 7.)[1]

It is essential to note that this language as expressly stated has reference only to "these changes" which mean the changes made in the 1937 Act as compared with the 1935 Act.[2] In framing the 1937 Act, the Act of 1935 was not repealed. It was amended. And the amendment did these three things:

First. In the 1935 Act trucking service was excluded. The 1937 amendment extended this by adding casual service and the casual operation of equipment or facilities. The amended wording is this: "except trucking service,

[1] This is from the House report on H. R. 7519, 75th Congress, 1st Session, June 18, 1937.

"The present act (sec. 215) embraces within its scope 'any company which may be directly or indirectly owned (by a carrier) or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of and operating the business of any such "carrier". This language has been changed so as to make certain the inclusion of a company or companies owned or controlled in common by several companies. The pending bill also excludes casual service and the casual operation of equipment or facilities" (p. 2).

[2] The definition of "carrier" (employer) insofar as material was this:

"The term 'carrier' means any express company, sleeping-car company, or carrier by railroad, subject to the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *" (49 Stat. 967).

casual service, and the casual operation of equipment or facilities."

Second. In the 1935 Act ownership or control of these affiliated companies was that of one carrier. This was changed in the 1937 Act to "one or more such carriers." As amended the language is this: "and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith." The same Senate report referred to above expressly mentions this change in this language:

> "* * * This language has been clarified to make it clear that coverage extends to a company which is owned or controlled in common by several companies. * * *" (p. 7).

Third. The following associations and organizations not covered at all in the 1935 Retirement Act were included in the 1937 Act in this language: "railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services *in connection with or incidental to* railroad transportation." (Italics supplied.)

It is to be noted that as to those associations just above mentioned the relationship is "in connection with or incidental to" and not just "in connection with" as in the case of the subsidiary companies. It will thus be seen that the earlier part of the report had already in a separate paragraph spoken of these companies owned or controlled by one or more carriers: and what the report meant in speaking of "all those organizations which are intimately related to the transportation of passengers or property by railroad" was those associations or organizations such as traffic associations and tariff bureaus

whose services are *in connection with or incidental to* railroad transportation. As thus explained, the meaning of that part of the report on which reliance is placed both by the Retirement Board and the Brotherhood is clear.

Stress is placed also by the Retirement Board in its brief (pp. 32-33) upon the statement made by Senator Wagner on the floor of the Senate with respect to the Retirement Bill as being applicable to "storage and other facilities", obviously meaning of the carriers. But the warehouses of Duquesne are not facilities of Pennsylvania. A related situation where an affiliate of the carriers owned property at Detroit, unloaded cars of perishable freight, and furnished display and sales privileges to dealers, was specifically held not to be a facility of the railroads. In that case the Interstate Commerce Commission said this:

> "Transportation of produce into the Produce terminal was discussed by division 2 in *Reciprocal Switching at Detroit*, 215 I. C. C. 284, wherein increased switching charges were found not justified. The division said at pages 287 and 288:
>
> 'The produce terminal is not taxed under the laws of the State of Michigan as property devoted to railroad purposes, but the auxiliary yard is so taxed. The Green Real Estate Company makes a charge of $4 per car for the labor furnished in unloading cars at the terminal buildings, and a like charge is made when cars are sold and unloaded at the platforms. These charges, protestants point out, are not on file with this Commission. Transportation of this traffic ends when the cars are placed by the Union Belt in the produce terminal. The Green Real Estate Company is not subject to the Interstate Commerce Act and the charges referred to are for nontransportation services. It follows that these charges are not subject to our jurisdiction and there is no requirement that they be published and filed.'
>
> . . . . . .

"*Conclusions.*—We find that facilities provided for the display and sale of perishable produce delivered at the produce terminal are facilities for commercial transactions not part of transportation, and therefore not subject to regulation under the provisions of the act.

"We further find that defendants were and are obligated to deliver perishable produce at the produce terminal when delivery is desired for the purpose of using the commercial facilities for display and sale of the produce, and in the event that consignees were and are entitled to the use of these facilities under the law applicable to their use."

Growers Marketing Co. v. *Pere Marquette Ry. Co.*, 248 I. C. C. 215, 227.

The corresponding statement from the Chairman of the House Committee and who sponsored the bill on the floor of the House was this:

"I will not attempt to make a detailed analysis of the provisions of the bill but will roughly refer to some of its important features.

"Employers

"Employers subject to the act are express companies, sleeping-car companies, rail carriers subject to the Interstate Commerce Act, companies controlled by one or more of the employers in the transportation business or in railway service, and certain railroad and labor organizations having slightly less than 4,000 employees, which are also treated as employers in the bill."

(81 Congressional Record, Part 6, p. 6081.)

CONCLUSION.

For the further reasons appearing in this reply memorandum, it is asked that the judgment of the Circuit Court of Appeals for the Second Circuit be affirmed in No. 95, and the judgment of the United States Court of

Appeals for the District of Columbia be reversed, and that of the District Court of the United States for the District of Columbia be affirmed in No. 103.

Respectfully submitted,

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